Office-Supreme Court, U.S.
FILED
FEB 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEROME P. JAMROCH, Individually and as Representative of a Class of Persons Similarly Situated,

Petitioner,

vs.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois; EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois; and the COUNTY OF COOK, a body politic,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1982

JEROME P. JAMROCH, Individually and as Representative of a Class of Persons Similarly Situated,

Petitioner,

vs.

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois; EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois; and the COUNTY OF COOK, a body politic,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

Petitioner has correctly invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). However, as shown in this Brief, respondents suggest that petitioner has failed to demonstrate any compelling reason for this Court to grant a writ of certiorari.

REASONS FOR DENYING THE WRIT

INTRODUCTORY STATEMENT

Morgan M. Finley is the Clerk of the Circuit Court of Cook County. Bail bonds posted by persons accused of crimes are deposited with Finley. It is his practice to invest those deposits, and to pay the interest earned to Edward J. Rosewell, Treasurer of Cook County, for the benefit of Cook County. The retained interest thus benefits all of the residents of Cook County, and indirectly defrays a portion of the costs incurred in maintaining the criminal justice system.

Petitioner was arrested in Cook County and charged with attempted theft. Bond was set at $1,000.00, and pursuant to Ill. Rev. Stat. ch. 38, § 110-7(a), petitioner posted $100.00 (10% of the bond) with Finley.

Eighty-nine days later, the charge against petitioner was stricken with leave to reinstate. Because no charge was then pending, the criminal court ordered that petitioner's bond be refunded. The amount of the refund is governed by Ill. Rev. Stat. ch. 38, § 110-7(f), which provides, in pertinent part:

> When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, *unless the court orders otherwise*, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. (emphasis added)

Petitioner apparently concedes that he had the right, and opportunity, pursuant to § 110-7(f), to request the criminal court to order that the bail refund include any interest earned on the clerk's investment of the

bail deposit. It is undisputed that petitioner failed to make such a request. Accordingly, the clerk, pursuant to § 110-7(f), deducted 10% of the amount deposited as bail bond costs,[1] and refunded the balance ($90.00) to the petitioner.

After waiting two months, petitioner filed this action in the Chancery Division of the Circuit Court of Cook County. The complaint alleges that the clerk invests bail bond deposits, retains the interest earned on those investments, and that the retention constitutes an unconstitutional taking of private property in violation of the Fifth Amendment to the Constitution of the United States.

The respondents filed a motion to dismiss the complaint claiming, *inter alia*, that the matter was barred because of petitioner's failure to raise the taking issue in his earlier criminal proceeding, and because bail bond deposits do not constitute private property. The chancery court found that bail bond deposits are not private property and dismissed the complaint.

The petitioner then appealed to the Illinois Appellate Court, which affirmed the dismissal of the complaint. The Appellate Court found that petitioner had the right and obligation, in his criminal proceeding, to challenge the retention of earned interest. The Appellate Court ruled that petitioner's chancery action was improper because the doctrine of *res judicata* operated to forbid a collateral attack of all questions regarding petitioner's bail funds and their disposition "which could properly have been raised and determined" by the criminal court.

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[1] This Court has previously reviewed and upheld the validity of the deduction. *Schilb v. Kuebel*, 404 U.S. 357, 92 S.Ct. 479 (1971).

The Appellate Court denied a subsequent petition for rehearing, and petitioner then filed a petition for leave to appeal to the Illinois Supreme Court. The Supreme Court denied that petition on October 5, 1982.

I.

PETITIONER HAS FAILED TO DEMONSTRATE ANY VALID REASON WARRANTING THIS COURT'S REVIEW OF THE STATE LAW GROUNDS UPON WHICH THE APPELLATE COURT BASED ITS AFFIRMANCE OF THE DISMISSAL OF PETITIONER'S COMPLAINT

The Illinois Appellate Court specifically held that the petitioner had a duty to raise all questions regarding his bail bond deposit before the criminal court at the time that court ordered a refund of the deposit. Because the petitioner failed to raise the issue of interest retention, the Illinois Appellate Court held that petitioner's claim was barred by *res judicata*. That holding was solely based on established state law.

The petitioner acknowledges that this case was decided by the Illinois Appellate Court on state law grounds, and he concedes that it is not ordinarily the function of this Court to correct errors of state law made by state courts. (Petition, pp.11-12). Although the petitioner correctly notes that there are exceptions to this rule, he incorrectly argues that this case falls within those very limited exceptions. That argument is not well founded.

Briefly summarized, petitioner's argument is that a state court judgment based upon state law grounds is reviewable where the nonfederal grounds upon which the judgment is based were "without any fair or substantial support," or were "untenable". Petitioner further notes that such a judgment is reviewable if based upon a novel

procedural requirement, is "clearly ill founded," or is based upon a state procedural requirement which is not "strictly or regularly followed."

After setting forth the exceptional situations where review of judgments founded on state law is proper, petitioner attempts to equate this case with this Court's decision in *Postal Telegraph Cable Co. v. City of Newport*, 247 U.S. 464, 473, 38 S.Ct. 566 (1918). However, that case is absolutely distinguishable.

In *Postal Telegraph*, the plaintiff had denied that it was a party to an earlier suit, and denied that it was in privity with the party in the earlier suit. The state court had completely and erroneously ignored the denials, and held that *res judicata* barred the second suit. This Court looked behind the *res judicata* label, and determined that the state decision was clearly ill founded because the state court had improperly failed to give effect to Postal Telegraph's denials.

Other than the phrase "res judicata", there is not a hint of similarity between *Postal Telegraph* and this case. Here, petitioner was admittedly a party to the earlier criminal action. The criminal court admittedly ordered a refund of the bail bond deposit. Petitioner unquestionably had an opportunity to litigate his claim for a refund of the interest earned. In similar situations, where parties had earlier opportunities to raise matters but were barred by state court judgments from litigating those matters based upon the application of the doctrine of *res judicata*, this Court has traditionally refused to review state court constructions of state laws. See, *Durley v. Mayo*, 351 U.S. 277, 76 S.Ct. 806 (1956); *Haley v. Breeze*, 144 U.S. 130, 12 S.Ct. 836 (1892); and *Northern Pacific Railroad Co. v. Ellis*, 144 U.S. 458, 12 S.Ct. 724 (1892).

Contrary to petitioner's suggestions, there is nothing novel about the Appellate Court's application of *res judicata* in this case. Rather, *res judicata* is a doctrine which has long been recognized and followed in Illinois. Its application in this case is consistent with its application in earlier Illinois cases.

Here, in affirming the trial court's dismissal of petitioner's complaint, the Appellate Court relied, in part, on its contemporaneous opinion in *Morgan v. Finley*, 105 Ill. App.3d 80, 433 N.E.2d 1047 (1982). In *Morgan*, the plaintiff had been placed under supervision and was ordered to pay a fine and costs.[2] Morgan did not appeal, but in a subsequent class action claimed that the imposition of fines and costs as an incident to supervision was unconstitutional. The *Morgan* Court, relying upon the dissent issued by the Illinois Supreme Court in *Roth v. Yackley*, 77 Ill.2d 423, 396 N.E.2d 520 (1979), and the decision in *Sanner v. Champaign County*, 88 Ill.App.3d 491, 410 N.E.2d 656 (1980), held that the class action constituted "an impermissible collateral attack" on the order which placed the plaintiff on supervision. (105 Ill.App. at 84, 433 N.E.2d at 1049).

Of course, the decisions in *Roth* and *Sanner* were published long before petitioner filed his complaint in this case. Moreover, the decisions in *Roth* and *Sanner* merely followed the established application of *res judicata*. As recently as 1979, in *Hughey v. Industrial Commission*, 76 Ill.2d 577, 582, 394 N.E.2d 1164, 1166 (1979) the Illinois Supreme Court restated the scope of *res judicata* as follows:

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[2] It should be noted that petitioner has misstated the facts in *Morgan* (Petition, p.11). Contrary to petitioner's misstatement, the *Morgan* plaintiffs, as petitioner here, had raised certain issues in their collateral action which had not been raised before the courts which heard their criminal cases.

> "'[T]he conclusiveness of the judgment in such case [the prior action] extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. This rule applies to every question relevant to and falling within the purview of the original action, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of due diligence.' 46 Am. Jur.2d *Judgments*, sec. 417, at 585-86."

See also, *Morris v. Union Oil Co.*, 96 Ill.App.3d 148, 154, 421 N.E.2d 278 (1981); *Smith v. Bishop*, 26 Ill.2d 434, 187 N.E.2d 217 (1962); *Midlinsky v. Rubin*, 341 Ill. 378, 386-7, 173 N.E. 368 (1930).

The applicability of *res judicata* to defeat claims of hopeful class litigants was more recently utilized by the Illinois Supreme Court in *DeBruyn v. Elrod*, 84 Ill.2d 128, 137-8, 418 N.E.2d 413, 418 (1981), where the plaintiffs contested the constitutionality of a fee collected in foreclosure actions. Certain class members had been parties to the earlier foreclosure actions, and the Court ruled that the failure of those members to contest the fees in the foreclosure actions barred them from participating in the subsequent class action.

More recently, *res judicata* was utilized to bar class actions challenging the retention of a portion of bail bond deposits permitted under Ill. Rev. Stat. ch. 38, § 110-7(f). In the consolidated appeals of *Walker v. Cockrel* and *Lauth v. County of Lake*, ... Ill.App.3d ..... (Docket Nos. 82-90 and 82-209, decided November 24, 1982), the plaintiffs challenged the retention on Illinois constitutional grounds. Like the petitioner here, those plaintiffs had failed to raise their constitutional claims in the criminal courts. The Illinois Appellate Court, Second District, relying on *Morgan v. Finley*, *supra*, *Sanner v. Champaign County*, *supra*, and *DeBruyn v. Elrod*, *supra*, held that

plaintiffs were required to raise their constitutional issues in the criminal courts, and that plaintiffs' failure barred a collateral attack of the judgments of the criminal courts.

Res judicata was also utilized to defeat an action to recover bail bond deposits in *District 65, Distributive Processing and Office Workers Union v. McKague*, 115 F.Supp. 227 (W.D. Penn. 1953), *appeal dismissed* 216 F.2d 153 (3d Cir. 1954). There, a union had posted bail for several of its indicted members in a state court proceeding. The state court had ordered the court clerk to refund the bond to the attorney (McKague) for the members, and the union then sued McKague, in federal court, for a return of the bail funds. The court dismissed the action, stating:

> "This then becomes an attempt to attack an order of of a court of competent jurisdiction in a collateral proceeding in this court. The law is well settled in Pennsylvania that in the absence of fraud a decree of a court of competent jurisdiction, valid or regular on its face, cannot be impeached by the parties or privies thereto or by a stranger in a collateral proceeding in the same or another court." (115 F.Supp. at 230)

The principal case which petitioner believes demonstrates the error of the Appellate Court in this case is *Chicago Park District v. Kenroy, Inc.*, 58 Ill.App.3d 879, 374 N.E.2d 670, *aff'd in part*, 78 Ill.2d 555, 567 (1980). Petitioner labels the Appellate Court's interpretation of *Kenroy* as "question-begging", and misstates the facts of that case by suggesting that an issue which the *Kenroy* plaintiffs sought to raise in the subsequent action could have been raised in an earlier action.

The plaintiffs in *Kenroy* sought to impose a constructive trust upon funds received as a result of an earlier

eminent domain proceeding. The Illinois Appellate Court rejected a collateral attack defense because the second action, which raised issues of fraud and unjust enrichment, did not seek to impeach or vacate the earlier judgment. Significantly, the Court found that the new issues would have been "clearly improper" in an eminent domain proceeding. (58 Ill.App.3d at 891) The Appellate Court recognized that the earlier judgment "is not open to contradiction or impeachment in any collateral action or proceeding, except for fraud in its procurement . . ." (58 Ill.App.3d at 890). Clearly, the plaintiffs' allegation of fraud in *Kenroy* served to defeat the collateral attack defense.

Of course, no fraud is alleged in the instant case. Quite simply, although petitioner had the right to seek a refund of interest earned on his bail bond deposit when he appeared before the court hearing his criminal case, he chose not to do so. Rather, he waited two months and then instituted this action.

The Appellate Court in this case recognized that petitioner's tactic was fatal, and stated in its Supplemental Rule 23 Order:

> "It was thus the legal duty of plaintiff to bring the matter of disposition and distribution of the bail funds immediately before the trial court so that it could exercise its legal jurisdiction. The process of waiting and the subsequent institution of an entirely new suit cannot be used to evade the rule against collateral attack. The doctrine of res judicata applies here to forbid as a collateral attack all questions regarding the bail funds and their disposition 'which could properly have been raised and determined' in the same court which entered the SOL."

Clearly, there is no basis for petitioner's suggestion that he could not have anticipated that his failure to raise the question of interest in his criminal case would oper-

ate to bar a subsequent and separate action to recover the interest. (Petition, p.14) The doctrine of *res judicata* is not new, and the utilization of *res judicata* to bar subsequent collateral attacks has long been the law in Illinois. As the above authorities demonstrate, the judgment of the Illinois Appellate Court in this case was properly based upon numerous cases, many of which were published before petitioner was arrested.

Petitioner should have, and easily could have, anticipated that his failure to raise the interest issue in the criminal court would bar a subsequent collateral action. Consequently, there is simply no basis for petitioner to claim that the Appellate Court decision was erroneous, or that the decision defeated his "reasonable expectations." Respondents suggest that there is similarly no basis for this Court's review of the state law grounds upon which the Appellate Court based its affirmance of the dismissal of petitioner's complaint.

II.

NO FURTHER REVIEW OF PETITIONER'S CONSTITUTIONAL CHALLENGE OF INTEREST RETENTION IS WARRANTED

A. Respondents' Retention Of Interest Earned On The Investment Of Petitioner's Bail Bond Deposit Does Not Constitute An Uncompensated Taking Of Private Property

Under Point I of his petition, the petitioner argues that the respondents' retention of interest earned on the investment of bail bond deposits constitutes an uncompensated taking of private property similar to the taking found in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446 (1980). Petitioner also contends (in claims never before raised in this case) that the retention of interest may constitute an unreasonable con-

dition upon the exercise of his right to bail or would be considered as "excessive bail." (Petition, p.9). Petitioner suggests that review should be granted to clarify these issues.

Respondents suggest that this case is readily and easily distinguishable from *Webb's*, and that the retention of *de minimis* interest does not infringe upon any of the petitioner's constitutional rights.

In *Webb's*, Eckerd's had entered into an agreement to purchase Webb's assets. When, at closing, Webb's debts appeared to exceed the purchase price, Eckerd's filed an interpleader action and tendered the purchase price to the court. The court, pursuant to Florida law, ordered the funds invested, at interest, by the court clerk. Thereafter, a receiver, appointed by the court, sought to recover the interest earned on the fund (an amount in excess of $90,000.00) and the clerk resisted.

In holding that the deposited fund constituted the private property of Webb's creditors, this Court acknowledged the general rule that interest on an interpleaded and deposited fund follows the principal and stated:

> "The deposited fund was the amount received as the purchase price for Webb's assets. It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors. Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court. The creditors thus had a state-created property right to their respective portions of the fund." (449 U.S. at 161, 101 S.Ct. at 451)

Clearly, *Webb's* involved a situation wherein the investing public official was a mere stakeholder for private liti-

gants, and the public entities represented by the stakeholder never had (and never could have) a possible or legitimate claim to the fund. Unlike this case, the creditors in *Webb's* had a property right in the fund from the moment of deposit, and the fund was not held for the benefit of the stakeholder, the court, or the public entity.

As petitioner must concede, bail bonds are held so as to insure a defendant's appearance at trial. As such, bail bonds are held solely for the benefit of the court. While bail bonds are held by the clerk, the criminal defendant has only a speculative, prospective and contingent claim to a refund. Indeed, it is only after being discharged of all obligations under the bond that an individual becomes entitled to a refund. Moreover, prior to a refund, the bond proceeds may be forfeited (pursuant to Ill. Rev. Stat. ch. 38, § 110-7(h)), utilized to pay fines and costs (pursuant to Ill. Rev. Stat. ch. 38, § 110-7(i)), or paid to the defendant's attorney of record (Ill. Rev. Stat. ch. 38, § 110-7(f)). Quite simply, bail bond deposits are held for the benefit of the court, and the bail bond depositors are not entitled to a refund until after an adjudication and a refund order is entered.

Petitioner argues that the above-described contingencies are inapplicable here because he, and the class he attempts to represent, have already been discharged of all bail obligations and are entitled to a refund of their deposits. Petitioner disclaims an intent to recover interest on behalf of those criminal defendants who have forfeited their bonds or who have had their deposits applied to the payment of fines.[3]

[3] The relief sought in petitioner's complaint is not so limited. The prayer seeks a refund of "all such interest" earned. (Complaint, para. B, p.2; R.C8)

The weakness in petitioner's argument is apparent because ownership at the refund stage of proceedings is not at issue in this case. To the contrary, petitioner has the burden of proving his ownership of the bail deposit while said deposit is held by the clerk. It is during that period of time interest is earned. The trial court recognized the difficulties inherent in petitioner's effort to limit his purported class through a retrospective determination of ownership and the trial court rejected that attempt. Accordingly, the trial court concluded that a bail deposit "is not the private property of the depositor, irrespective of whether or not the deposit is eventually refunded to the depositor." (R.22)

In Illinois, bail bond funds are not held by the clerk of the court as a trustee, or in any other fiduciary capacity, for the benefit of the criminally accused. *Gonzales v. Danaher*, 30 Ill.App.3d 992, 332 N.E.2d 603 (1975) The funds serve a dual purpose: to guarantee the defendant's appearance at trial, and for the creation of a fund from which a judgment for a fine and costs may be satisfied. *People v. Nichols*, 71 Ill.2d 166, 177, 374 N.E.2d 194 (1978). Moreover, the clerk holds bail bond funds *in custodia legis*—in the custody of the law. The clerk serves as the hand of and agent for the court, and the bail funds cannot be garnished or attached by the depositor's creditors. *Gende v. Flemming*, 55 Ill.App.3d 659, 661, 371 N.E.2d 191 (1977); *A-1 Lithoplate, Inc. v. AFS Publishing Co.*, 66 Ill.App.3d 560, 562, 384 N.E.2d 395 (1978). While the funds are held by the clerk, the depositor loses all vestiges of ownership and only the court can lay claim to the funds. This status continues until the criminal court orders a refund of the bail.

This Court has reached a similar conclusion. In *Schilb v. Kuebel*, 404 U.S. 357, 92 S.Ct. 479 (1971), the Court was called upon to review the constitutionality of the Illinois

statutory system whereby clerks of the court are permitted to retain 10% of bail bond deposits. (Ill. Rev. Stat. ch. 38, § 110-7(f).) In upholding the Illinois bail bond system as against a claim of a violation of equal protection, the Court observed:

> "One who deposits securities or encumbers his real estate precludes the use of that property for other purposes. And one who deposits the full amount of his bail in cash is dispossessed of a productive asset throughout the period of deposit; *presumably, at least, its interim possession by the State accrues to the benefit of the State.*" (404 U.S. at 367, 92 S.Ct. at 486; emphasis added)

In the instant case, petitioner seeks to recover the interest earned on his $90.00 bail bond refund for the period of deposit—89 days. While it is true that by depositing the bail bond funds with the clerk, petitioner lost an opportunity to invest those funds elsewhere, this lost opportunity does not constitute a "taking". The mere loss of the ability to exploit one's property does not establish a "taking", *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130, 98 S.Ct. 2646 (1978), *rehearing denied* 99 S.Ct. 226, and a mere lessening of property value, as opposed to an appropriation, is a permissible restriction on the use of that property. *Andrus v. Allard*, 444 U.S. 51, 65-6, 100 S.Ct. 318, 328 (1979)

This is particularly true where, as here, a claimant's taking argument is based upon speculative profitability. Because courts are not "especially competent" to predict profitability, an interest in anticipated gains "has traditionally been viewed as less compelling than other property-related interests." (*Andrus v. Allard, supra*, 444 U.S. at 66.)

Although the Illinois Appellate Court did not decide petitioner's constitutional claim, respondents suggest that

the trial court properly found that bail bond deposits do not constitute the private property of the depositors, and properly held that the retention of interest earned on the investment of those deposits does not constitute an unconstitutional taking of private property. No further review of this issue is necessary or warranted.

B. Petitioner's Challenge Of Interest Retention, Based Upon Eighth Amendment Grounds, Has Been Improperly Raised In This Court

Petitioner has belatedly, and improperly, suggested that the retention of interest earned on the investment of his bail bond deposit may constitute an unreasonable condition upon his exercise of the right to bail, or may transform his $100.00 bail deposit to the level of "excessive bail." (Petition, at p.9) Petitioner is wrong.

There is no logical connection between the retention of interest earned on bail bond investments and the Eighth Amendment's prohibition of excessive bail. Quite simply, regardless of whether or not interest is retained, the initial amount paid by the criminally accused to secure his freedom pending trial remains the same. Petitioner's citations of *Stack v. Boyle*, 342 U.S. 1 (1951) (where the trial court improperly failed to separately consider bail amounts for several defendants), *Cohen v. United States*, 82 S.Ct. 526 (1962) (where an appeal bond was set at a level sufficient to guarantee payment of a "committed fine"), and *United States v. Skrypeck*, 505 F.2d 458 (D.C. cir. 1974) (where a recognizance bond was improperly revoked because of a failure to appear for the preparation of a pre-sentence report) have no relevance to this case.

In addition, and perhaps of more significance, it should be noted that petitioner has raised the issue of excessive bail for the first time in this Court. Petitioner's claim in the courts below rested solely on the taking provisions of

the Fifth Amendment to the United States Constitution and Article I, Section 15 of the 1970 Illinois Constitution. As this Court stated in *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1162 (1969)

> "It was very early decided that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

See also, *Oxley Stave Company v. Butler County*, 166 U.S. 648, 655, 17 S.Ct. 709 (1897), and *Whitney v. California*, 274 U.S. 357, 362, 47 S.Ct. 641 (1927).

Clearly, petitioner's excessive bail claim is not properly before this Court. Had petitioner desired to challenge interest retention on an Eighth Amendment ground, he should have raised that challenge in the Illinois criminal and chancery courts. Petitioner's failure bars a review of his belated challenge in this Court.

CONCLUSION

For the foregoing reasons, respondents pray that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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